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**In the Supreme Court of the United States**

**OCTOBER TERM, 1988**

**FLORIDA POWER & LIGHT  
COMPANY, ET AL., PETITIONERS**

**v.**

**UNITED STATES OF AMERICA AND UNITED STATES  
NUCLEAR REGULATORY COMMISSION**

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MEMORANDUM FOR THE RESPONDENTS**

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## **MEMORANDUM FOR THE RESPONDENTS**

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Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 146-147 (to be codified at 42 U.S.C. 2213), directs the Nuclear Regulatory Commission (NRC or Commission) to collect 33 percent of its annual budget by assessing fees on NRC licensees that are "reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." Acting under that mandate, the Commission adopted a rule for fiscal year 1987 that imposed a fee of \$950,000 on each holder of a license to operate a nuclear reactor (Pet. App. 4a). Petitioners contend that Section 7601 of COBRA, as interpreted by the Commission, is an unconstitutional delegation of the legislative power of taxation.

1. Before COBRA was enacted, the NRC imposed certain user fees under the Independent Offices Appropriation Act of 1952 (IOAA), 31 U.S.C. 9701. That statute allows the Commission, as well as other government agencies, to charge fees for services rendered to a particular entity. Under the IOAA, the Commission charged fees for individualized services performed for regulated entities (e.g., inspections), but did not charge fees for projects that affected more than one entity, such as research and rulemaking. Pet. App. 3a.

In 1986, Congress adopted Section 7601 of COBRA, directing the Commission to collect up to 33 percent of its budget through charges imposed on NRC licensees. Under Section 7601(b)(1)(B) of that Act, the Commission must assess annual fees that are "reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." Acting within COBRA's short deadlines, the Commission adopted a rule requiring operators of nuclear power plants to pay \$950,000 per reactor for fiscal year 1987. Those fees help to recover the costs of the Commission's generally applicable programs, such as research, that are essential to the Commission's regulation of all commercial nuclear power reactors. Pet. App. 3a-4a.<sup>1</sup>

2. Petitioners, who own or operate nuclear power reactors licensed by the Commission, sought judicial review of the Commission's fee rule for fiscal year 1987 in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals upheld the Commission's rule (Pet. App. 1a-21a). The court first rejected peti-

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<sup>1</sup> The Commission made adjustments to its fee calculation at the end of fiscal year 1987 and returned over \$100,000 to each licensee (Pet. App. 4a n.3). The Commission's fee rule also allows licensees to seek an exemption from paying the fee in certain circumstances.

tioners' claim that Section 7601 of COBRA allows the Commission to charge fees only for services that are directly and specifically performed for the benefit of a particular licensee. The court noted that petitioners' view of COBRA would make that statute identical to the IOAA, which allows the Commission to charge user fees only for services performed with respect to a particular entity (Pet. App. 6a). The court observed, however, that Congress clearly wanted Section 7601 of COBRA to go beyond the IOAA. The Floor Managers of COBRA stated that Section 7601 was designed to establish a "standard separate and distinct" from the IOAA "in order to permit the Commission to more fully recover the costs associated with regulating various categories of Commission licensees" (Pet. App. 6a). Accordingly, the court concluded that the Commission did not violate Section 7601 by charging fees to pay for general programs that apply to the entire class of nuclear-reactor licensees.<sup>2</sup>

The court of appeals next held that Section 7601 of COBRA is not an unconstitutional delegation of Congress's power to tax. The court assumed that Section 7601 creates a "tax," but held that Congress may delegate "the tax power where adequate standards are set for implementation of congressional intent" (Pet. App. 17a). Thus, the court of appeals rejected petitioners' contention that, under this Court's decision in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), Congress may not give the Executive Branch discretion in implementing tax laws. And the court held (Pet. App. 19a) that Section 7601 satisfies the test for legitimate delegation of congressional authority by setting forth in-

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<sup>2</sup> The court also rejected (Pet. App. 8a) petitioners' claim that the Commission's research projects are not a "regulatory service" within the meaning of Section 7601(b)(1)(B).



telligible standards to which the Commission is directed to conform, *e.g.*, the provision requiring that the Commission collect 33 percent of its budget through fees that are reasonably related to the regulatory service provided.

Judge Starr dissented. He believed that the Commission's rule violated Section 7601 of COBRA because it "makes no attempt to allocate specific benefits to identifiable beneficiaries" (Pet. App. 24a). He stated that Section 7601 of COBRA requires the Commission to "make some assessment of which (and how much) licensees are benefited by its 'regulatory services' " (*ibid.*). Judge Starr thought that petitioners' constitutional challenge counseled in favor of this narrow construction of COBRA.

3. In this petition, petitioners renew their claim that Section 7601 of COBRA, as interpreted by the Commission, is an unconstitutional delegation of Congress's power to tax. They argue that Section 7601 is constitutional only if it is read to limit the Commission to recovering the costs of specific services that provide "value directly to identifiable beneficiaries" (Pet. 12).

On October 3, 1988, the Court noted probable jurisdiction in the government's appeal in *Burnley v. Mid-America Pipeline Co.*, No. 87-2098. *Mid-American Pipeline* concerns the constitutionality of Section 7005 of COBRA, which directs the Department of Transportation to recover the costs of two pipeline safety programs by collecting fees from pipeline operators. The district court in *Mid-American Pipeline* held that Section 7005 is an unconstitutional delegation of the taxing power. Sections 7005 and 7601 of COBRA contain similar fee provisions<sup>3</sup>

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<sup>3</sup> Section 7005 of COBRA directs the Department of Transportation to fund two safety programs by assessing fees "in reasonable relationship" to three criteria. Section 7601 tells the Commission to fund up to one-third of its budget through fees charged to licensees that are "reasonably related" to the Commission's regulatory services.

and the legal challenges in this case and *Mid-American Pipeline* are analogous. Thus, as petitioners here acknowledge, "the basic questions" raised by this petition "are already before [the] Court in" *Mid-American Pipeline*" (Pet. 6).<sup>4</sup> Hence, this case should be held pending the Court's decision in *Burnley v. Mid-America Pipeline Co.* and disposed of in light of that decision.

Respectfully submitted.

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*Solicitor General*

WILLIAM H. BRIGGS, JR.  
*Solicitor*  
*Nuclear Regulatory Commission*

OCTOBER 1988

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<sup>4</sup> We have furnished petitioners with a copy of our jurisdictional statement in *Burnley v. Mid-America Pipeline Co.*, No. 87-2098.